Office-Supreme Court, U.S.
FILED
AUG 20 1964
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 316.

ALLIED CHEMICAL CORPORATION,
Petitioner,

v.

HAMPTON ROADS CARRIERS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT

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BRIEF IN OPPOSITION

THE OPINIONS BELOW

The Opinion of the District Court (App. 1-14 of the Petition) is reported at 211 F. Supp. 940. The unanimous opinion of the Court of Appeals for the Fourth Circuit reversing the District Court (App. 15-27 of the Petition) is reported at 329 F. (2d) 387. On April 23, 1964 the Court of Appeals for the Fourth Circuit denied rehearing in this matter.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

Contrary to the impression sought to be created in the Petition, the Court of Appeals did not decide any question of law in conflict with the decisions of this Court. The Court of Appeals merely reversed the District Court, which had obviously applied the wrong law in the case, contrary to the decision of this Court in *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 62 S. Ct. 156, (1941) and for other reasons so well set forth in the opinion of Circuit Judge Bryan.

This case involves only a private controversy between the respective litigants. It does not involve any major principle of law, important to the general public, admiralty or anyone other than the competing parties.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner's summary of the facts omits many of the essentials necessary to a correct understanding of this case.

The charter party between petitioner, cargo, and respondent, carrier, was one of private carriage as is admitted by petitioner at page 2 of its Petition. The charter party was prepared by petitioner on its printed form and forwarded to respondent for execution. No bill of lading was ever requested or issued, as is admitted by petitioner at page 4 of its Petition. The charter party required that the cargo be loaded on the barge by petitioner, which was done, no other cargo or cargo owner being involved.

On November 11, 1958 the barge B.A-1401 sank in Chesapeake Bay after having been loaded by petitioner's employees at North Claymont, New Jersey, a few days before. After many attempts to salvage the barge, it was finally raised in June of 1959, obviously undergoing great damage to her hull in the interim. In support of this, we quote from the opinion of the Circuit Court of Appeals. (Petitioner's App. 20):

> "The next day a diver examining the barge on the Bay bottom observed severe damage along the entire port side of the hull, including a deep longitudinal indentation. She was not raised until June 1959. Meanwhile she had been brought up 15 or 20 times, slipping back in each instance. Finally in June 1959, salvage operations succeeded; she was taken to Norfolk and hauled on the railway. All interests appeared for the survey."

At the trial several surveyors, with one notable exception, testified as to what might have caused the barge to sink. This notable exception was cargo's expert surveyor Jaeger, who had thoroughly examined the barge some six weeks prior to the sinking and reported it fit to transport a cargo of salt cake which it was carrying at the time of the sinking. This expert made several surveys while attempts were made to raise the barge and listed as a cause of the sinking, improper loading, which was performed by petitioner's own employees a few days before the sinking. This expert was named as a witness to be called by cargo at the trial but was not called for reasons now obvious. When asked by the Court of Appeals why this expert was not called, counsel for petitioner frankly replied, "Because he would say that the sinking was due to faulty loading". See Appendix to Petition, page 26.

Based on the above admission, the misplacing of the burden of proof by the trial Court, numerous improper inferences drawn by the trial Court from the basic evidentiary facts and thus not insulated under this Court's "clearly erroneous" rule in *McAllister* v. *United States*, 348 U.S. 19 (1954), the Court of Appeals unanimously reversed the lower Court.

ARGUMENT

Reasons For Rejecting The Petition

Petitioner having admitted at page 2 of its Petition and elsewhere therein that respondent was a private carrier, this case obviously is controlled by *Commercial Molasses Corp.*, supra. At page 160 of 62 S. Ct., this Court in that case said:

> "With respect to the burden of proof, this case is to be distinguished from those in which the burden of proving seaworthiness rests upon the vessel when it is a common carrier. The present contract of affreightment was for private carriage in New York harbor; * * *, and thus gave to respondent the status of a bailee for hire of the molasses * * *. Hence we are not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in

consequence of his being an ordinary 'bailee' but because he is a special type of bailee who has assumed the obligation of an insurer. Schnell v. The Vallescura, 293 U.S. 296, 304, 55 S. Ct. 194, 79 L. Ed. 373, * * *.

"For this reason the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. The Edwin I. Morrison, supra, 153 U.S. at page 211, 14 S. Ct. at page 826, 38 L. Ed. 688; The Majestic, 166 U.S. 375, 17 S. Ct. 597, 41 L. Ed. 1039; Schnell v. The Vallescura, supra; * * *.

"But as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His undertaking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. *In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks,* * * *, as it did upon petitioner here when it alleged the breach of warranty as the basis of its claim. Petitioner apparently does not challenge the distinction which for more than two centuries since Coggs v. Bernard, supra, has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a

> private bailment of merchandise on a barge in New York harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lessor obligation, in which case the bailor (cargo) cannot recover without proof of its breach." (Italics ours)

Aside from respondent's initial reasons for the denial of a writ in this case, we shall discuss the contentions raised by petitioner, in order.

I. *"Reasons A and B" Advanced At Page 5 Of The Petition Present Specious Reasoning In An Effort To Show A Conflict With Decisions Of This Court. Indeed The Opinion Of The Circuit Court Of Appeals Is Directly In Line With The Decisions Of This Court.*

Here petitioner alleges that in cases of private carriage, the question whether cargo or carrier must explain the loss is crucial where the cause of loss is in doubt; furthermore it alleges that the holding in this case by the Court of Appeals that the burden of explaining the cause of the loss is on cargo is in conflict with decisions of this Court.

As is often the case, in attempts to support a basis for granting writs to this Court, petitioner endeavors to emasculate the opinion of the Court of Appeals in an effort to show an alleged conflict, when in actuality none exists. The very questions raised under petitioner's "Reasons A and B" have been laid to rest by this Court in *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 62 S. Ct. 156 (1941). Therein this Court, as heretofore shown, speaking through Chief Justice Stone, held that the burden

of showing unseaworthiness in private carrier cases is upon cargo.

The decision of this Court in *Commercial Molasses*, supra, is cited by the Court of Appeals for the Fourth Circuit in its opinion, 329 F. (2d) 387, at page 391, Appendix to the Petition, at pages 23 and 24, as one of its chief reasons for reversing the trial Court. The trial Court had erroneously placed the burden of proof upon the carrier.

Petitioner at page 5 of its Petition attempts to enlarge on the holding of the Court of Appeals. After alleging that the Court of Appeals was not justified in holding that the trial judge was clearly wrong in finding that the barge sank by reason of a defective weld and bulkhead, it argues:

> "* * * Even accepting these alternative findings, we submit that the Court erred under the applicable decisions of this Court in excusing the carrier. The basis for the error is the holding that, as respondent was not a common carrier, the burden of establishing the cause of the loss is on cargo."

Nowhere does the opinion of the Fourth Circuit say cargo must establish the "cause of the loss". What it does say is that pursuant to this Court's decision in *Commercial Molasses*, supra, cargo had the burden of proving unseaworthiness, 329 F. (2d) 387, at 391. This is a proper finding, inasmuch as the sailent issue in both the instant case and *Commercial Molasses*, supra, was whether or not the barge was seaworthy.

Petitioner filed its claim for loss of cargo in respondent's limitation proceeding and in so doing alleged the

unseaworthiness of respondent's barge BA-1401. Having made this allegation, the law imposed upon petitioner the burden of proving its correctness.

In "Reasons A and B", petitioner at page 5 of its Petition, further argues that under *McAllister* v. *United States*, 348 U.S. 19, (1954) the District Court cannot be reversed unless its decision was clearly erroneous. Petitioner obviously would have this Court overlook the important reasons advanced by the Fourth Circuit for its reversal. The first of these is that the Fourth Circuit found that the determination of the trial Court from the inferences that respondent's barge was unseaworthy was clearly erroneous, but even if existent the fault was excused under the terms of the charter party by respondent's diligence in seeing to her seaworthiness. 329 F. (2d) 387 at 388. It further found that the trial Court had placed the burden of proof upon the wrong party by misapplying the correct law. 329 F. (2d) 387 at 391.

It is common knowledge that where facts are not in dispute and where the Court of Appeals does not have to overturn the District Court's findings of fact, the Court of Appeals may reverse on inferences or conclusions of the District Court, free from restraint of the "clearly erroneous" rule, *Fahs* v. *Taylor*, (5 Cir., 1956), 239 F. (2d) 224, certiorari denied, 393 U.S. 936, 77 S. Ct. 812; *Gediman* v. *Anheiser Busch, Inc.*, 299 F. (2d) 537, (2 Cir., 1962); *Automotive Devices Co.* v. *Automotive Devices Co., of Pa.*, 292 F. (2d) 663, (3 Cir., 1961).

The Court of Appeals reversed because the inferences drawn by the trial Court from its factual findings were clearly wrong. Such a reversal is not subject to the insulation of the rule in *McAllister* v. *United States*, supra. It

found that the District Court incorrectly placed the burden of proof upon the barge owner in direct conflict with the decision of this Court in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, supra. This was purely a question of law.

Petitioner endeavors to limit *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, supra, to transportation in New York harbor. Nowhere is this better refuted than in the case of *Metropolitan Coal Co.* v. *Howard*, 155 F. (2d) 780, (C.C.A. 2, 1946). This case involved a private contract of carriage from a point in New Jersey to a point in Massachusetts. Therein, *Commercial Molasses*, supra, was cited by the Second Circuit as authority for placing the burden of proof in private carrier cases on cargo, as to the initial question of showing unseaworthiness.

Petitioner further cites *The Edwin I. Morrison*, 153 U.S. 199, 14 S. Ct. 823, (1899), as controlling in this case. That case was stated by this Court in *Commercial Molasses*, supra, to apply to common carrier cases, not private carrier cases, and at 62 S. Ct., page 162, Chief Justice Stone, speaking for this Court, explains the difference as follows:

> "Proof of the sinking of the barge aided petitioner, but did not relieve it from sustaining the burden of persuasion when all the evidence was in. This Court, in the case of private bailments, has given like effect to the rule that the unexplained failure of the bailee to return the bailed goods is prima facie evidence of his breach of duty, * * *, and the lower federal courts have applied correctly, we think, the same rule with respect to proof of unseaworthiness by the shipper *where the vessel has not assumed the obligation of a common carrier*. * * *.

"The Edwin I. Morrison called for no different result. There this Court reversed the findings of the lower Court on the ground that the explanation offered for damage to the cargo * * *, was only a conjecture supported by no direct testimony and was not sufficient to sustain the burden of the shipowner to prove that the vessel was seaworthy. * * *. The opinion must be taken as proceeding, as in *The Folmina and Schnell* v. *The Vallescura*, *supra*, *on the ground that the case was one in which the obligation assumed was that of a common carrier on whom the burden rests of proving that the cargo loss is not due to unseaworthiness.*" (Italics ours)

In summary, this Court in *Commercial Molasses*, supra, held that its decisions in both *The Edwin I. Morrison* and *Schnell* v. *The Vallescura*, supra, pertain to common carrier cases; that while *The Edwin I. Morrison* did involve a private carrier, that carrier had expressly assumed in the bill of lading the obligations of a common carrier and hence had assumed the burden of showing the cargo loss was not due to unseaworthiness. In the case now before this Court, the unexecuted form for a bill of lading attached to the charter party prepared by petitioner contains no provision to the effect that respondent carrier would assume the obligations of a common carrier. It merely provides that the terms of the charter party and not the bill of lading shall control as between the parties.

In the case at hand, petitioner admits no bill of lading was ever issued and none was requested. Petition, page 6. It follows, therefore, that respondent's duty to petitioner with respect to its cargo is encompassed within the terms of the charter party. This duty is clearly and correctly

stated in the opinion of the Court of Appeals, 329 F. (2d) 387 at 391, as follows:

> "II. But had the evidence disclosed unseaworthiness, Cargo still could not recover. Under the charter party, as we have noted, only 'want of due diligence on the part of the owner' can impose liability for unseaworthiness. Here the burden was upon Barge to prove itself requisitely diligent. Metropolitan Coal Co. v. Howard, 155 F. 2d 780. (2 Cir. 1946). We think it acquitted itself."

Petitioner has obviously misinterpreted *Commercial Molasses Corp.*, and *Metropolitan Coal Co.* v. *Howard*, supra. These cases, both of which were correctly applied by the Fourth Circuit, hold that in private carrier cases such as this, in order for cargo to recover, cargo has the initial burden of proving unseaworthiness. As to the issue of due diligence in providing a seaworthy vessel, which frequently is not reached unless cargo sustains its initial burden of showing unseaworthiness, (*Metropolitan Coal Co.*, supra) the burden of proof as to this subsequent issue, if reached, is upon the carrier.

The Court of Appeals for the Fourth Circuit reversed the District Court in the instant case on two grounds. First, it held that cargo had not sustained its burden of proof as to unseaworthiness and, second, even assuming that it had, carrier had more than sustained its burden of showing due diligence to furnish a seaworthy barge. In other words, respondent was exonerated on *both* issues. Indeed, when cargo's counsel admitted that their expert surveyor, if called, would have testified that the barge sank because petitioner's employees had improperly loaded it, the Court, we submit

should have upheld respondent's counterclaim for loss of the barge based on improper loading.

At page 7 of its Petition, after citing *Metropolitan Coal Co.* v. *Howard*, supra, petitioner makes the following statement:

> "* * * As the charter here grants the carrier essentially the same exceptions from liability as those afforded a common carrier by the Harter Act, the burden of proof must be the same and hence on the carrier."

This statement misconstrues the basic holding of that case. The opinion by Judge Learned Hand in *Metropolitan Coal*, 155 F. (2d) 780, at 783, states:

> "* * * Yet, although private, as well as common, carriers warrant the seaworthiness of their vessels, concededly there is a difference as to the burden of proof, for a shipper by private carrier must prove the breach. Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 62 S.Ct. 156, 86 L. Ed. 89 * * * *. Therefore we hold that, except as Howard may have modified his express warranty (seaworthiness) by the clause we have quoted, *the claimant (cargo) carried the burden of proof* and must succeed." (Italics ours)

The above statements by Judge Learned Hand are directly in accord with those of District Judge Campbell, whose opinion was affirmed on appeal by the Second Circuit. In the lower Court opinion at 53 F. Supp. 556, at page 560, Judge Campbell stated:

"The petitioner Thomas J. Howard was a private carrier. The entire capacity of each of the barges was given to the shippers, and no cargo other than that of the claimant shipper was carried, therefore, the petitioner Thomas J. Howard was not a common carrier, but a bailee, and the contract of carriage was a private contract of carriage. Citing cases. The parties were free to contract as they chose. Citing cases.

"The burden of proof in this case rests upon the claimant. Citing *Commercial Molasses*, supra.

"Before determining the question of limitation of liability in this case, we must *first* determine whether there is any liability, as there would be nothing to limit unless claimants, or either of them succeeded in establishing its claim. Citing *Commercial Molasses Corp.*, supra." (Italics ours)

The language in the private charter party here involved is practically identical with that in the charter involved in *Metropolitan Coal Co. v. Howard*, supra, which the Second Circuit held was one of private carriage. Like in *Metropolitan Coal*, supra, the mere statement in this charter party that there shall be no liability upon carrier unless caused by its want of due diligence to make the barge seaworthy (Appendix to Petition at page 17, is not sufficient in a private carrier case to change respondent's status from that of a private carrier to that of a common carrier. Even if it were, it would not change the end result in the instant case, because the Court of Appeals further found that the respondent had clearly met the burden upon it to show that it used due diligence to make the barge seaworthy. The barge having been decreed to be a constructive total loss, there would be no recovery to petitioner in the instant case

in either event. Respondent having met its burden of due diligence is entitled to limit its liability, even if it had been a common carrier, subject to all of the requirements of the Harter Act. 46 U.S.C.A., Section 190, et seq.

The foregoing is merely another reason why this Court should not grant certiorari in this case.

Petitioner argues in its Petition that the presence of a clause incorporating the due diligence language of the Harter Act into this private charter party imposed the burden of proving seaworthiness initially upon the carrier. Nowhere is this better refuted than in the very case and indeed the only case petitioner cites in support of this erroneous allegation, i.e., *Metropolitan Coal Co. v. Howard*, supra.

In *Metropolitan Coal Co. v. Howard*, supra, where a private contract of carriage incorporated this very same language, Judge Learned Hand expressly states, 155 F. (2d) 780 at 783, that the initial burden of proving unseaworthiness never changes and always remains where this Court's decision in *Commercial Molasses* placed it, i.e., upon cargo.

In the instant case like that of *Metropolitan Coal Co. v. Howard*, supra, language of the Harter Act as to due diligence was incorporated in a private charter party. As the Court of Appeals for the Fourth Circuit has here so correctly held, the burden of initially proving unseaworthiness was upon cargo and cargo had not met this burden, but even assuming cargo had met this initial burden, carrier had fully sustained its burden of showing due diligence, which entitles it to complete exoneration.

Very simply *Metropolitan Coal* holds, as did the Fourth Circuit in the instant case, that cargo must in private carrier cases first sustain its burden of proving unseaworthiness. The essential difference between the two cases is that in *Metropolitan Coal*, the Second Circuit found that cargo had met its burden of proving that the barge was unseaworthy and could recover, whereas in the instant case the Fourth Circuit, like in *Commercial Molasses*, supra, found that cargo had not met its burden of proving that the barge was unseaworthy and could not recover. Cargo is the claimant who alleged unseaworthiness as the basis of its claim and to prove its case must sustain this burden. If it does this, the burden of showing due diligence is then placed upon the carrier since, as is explained in *Metropolitan Coal Co. v. Howard*, supra, this language has been adopted from the Harter Act, which expressly places this burden, due diligence as distinguished from unseaworthiness, on carrier. However, the initial burden of showing unseaworthiness in private carrier cases, at all times remains upon cargo pursuant to this Court's decision in *Commercial Molasses Corp.*, supra, the decision of the Second Circuit in *Metropolitan Coal Co.*, supra, and the decision of the Fourth Circuit in the instant case.

The Fourth Circuit's decision in no way conflicts with any decision of this Court as petitioner argues in its Petition.

II. *Petitioner's "Reason C" At Page 7 Of Its Petition Obviously Assumes The Very Point In Issue Which Was Adversely Decided By This Court In Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 62 S. Ct. 156, (1941).

After stating "Reason C" at page 7 of the Petition, to

the effect that if carrier must explain the loss if does not escape liability unless the loss is brought within an exception of the charter party, petitioner starts its argument with the assumption:

> "If we are correct that the burden of proof was on the carrier, * * * *."

As we have just pointed out, this Court in *Commercial Molasses*, supra, ruled that in private carrier cases such as is here involved, the burden of proving seaworthiness is not upon the carrier, but that the burden of proving unseaworthiness is upon cargo. This principle of law cannot be more clearly stated than in *Commercial Molasses*, supra.

Because petitioner is obviously wrong in the above statement, its entire argument under "Reason C" has no merit and justifies no consideration by this Court.

In further support of its abortive argument, petitioner cites *Schnell* v. *The Vallescura*, 293 U.S. 296, 55 S. Ct. 194, and claims the Fourth Circuit decision is in conflict therewith. This again is erroneous. Petitioner at pages 7 and 8 of its petition states that *Schnell* v. *The Vallescura*, supra, applies to private carriers. This is obviously not so as the case was one of *common* carriage and so held by this Court in *Commercial Molasses*, *supra*, 62 S.Ct., at pages 160 and 162.

It is interesting to note that Chief Justice Stone, who wrote the opinion of this Court in *Commercial Molasses*, supra, wherein *Schnell* v. *The Vallescura*, is referred to as a common carrier case, also wrote the opinion of this Court in *Schnell* v. *The Vallescura*, supra. Obviously he was familiar with both cases and the differences therein. It,

therefore, follows that petitioner's statement at page 8 of its Petition:

> "* * * We submit that in exonerating the carrier merely because it found that the loss was not due to unseaworthiness, the Court of Appeals was in error and in conflict with the decision of this Court in *Schnell* v. *The Vallescura*, supra, as the cause of loss remains unexplained and the burden of explanation was on the carrier."

is wholly without merit. For the reasons heretofore pointed out, the instant case, involving a private carrier which had not assumed by contract or otherwise the obligations of a common carrier, is controlled by the decision of this Court in *Commercial Molasses*, supra, which was a private carrier case and not by its decision in *The Vallescura*, supra, which was a common carrier case.

All that was decided in *Schnell* v. *The Vallescura* is that in *cases of common carriage*, the carrier who claims an exception under the Harter Act has the burden of showing that it comes within that exception and that it is entitled to exoneration thereby. If it claims that a peril of the sea caused a disaster, then it must prove a peril of the sea.

In the instant case of private carriage, respondent admittedly would have had the burden of showing due diligence, if cargo had first met its prior burden of showing unseaworthiness. Otherwise it would not. That respondent carrier did in this case show in support of its petition for limitation of liability, that it had used due diligence to furnish a seaworthy barge, as found by the Court of Appeals, although this burden upon it did not arise because of petitioner's failure to meet its burden of showing that

the barge was unseaworthy, is certainly not prejudicial to petitioner. In respondent's limitation of liability proceeding petitioner had the burden of showing respondent's barge was unseaworthy as alleged by it in its claim, which burden petitioner did not meet, and respondent had the burden of showing that it used due diligence to furnish a seaworthy barge as alleged by it in its Petition, which burden the respondent did meet.

The Circuit Court of Appeals in this case found that as in *Commercial Molasses*, supra, petitioner (cargo) had not met its burden of showing that the barge was unseaworthy as it had alleged in its pleadings and for this reason could not have judgment against respondent for the loss of its cargo. The Court of Appeals also found that respondent had gone further and had met the burden imposed upon it in cases where cargo has shown the vessel to have been unseaworthy and had established beyond question that it had exercised *due diligence* to furnish a seaworthy barge.

Nowhere does petitioner cite any case to support its unheard of contention that a carrier who does not have the burden of proof must establish the cause of the loss.

Contrary to what cargo says at page 7 of its Petition, a carrier is only liable if cargo can prove unseaworthiness as alleged in it's claim, the burden of which this Court in *Commercial Molasses*, supra, and in kindred cases, has placed upon cargo.

III. *Petitioner's "Reason D" At Page 9 Of Its Petition Is Predicated Upon An Unproven Assumption.*

Petitioner here argues that if the cause of loss is unseaworthiness, unless the nature of the unseaworthiness is

determined, a carrier cannot establish that it used due diligence to make its vessel seaworthy. This argument was expressly rejected in *Peter Paul, Inc.* v. *Rederi. A/B Pulp.* (2 Cir.) 258 F. (2d) 901, certiorari denied 359 U.S. 910 (1959).

Just as it argues incorrectly in its "Reason C", heretofore dealt with, that the burden of explanation is upon the carrier in private carrier cases, petitioner again endeavors to advance its unsupported reasons for stating that a private carrier must determine the cause of the loss before it can show it used due diligence in furnishing a seaworthy vessel. Petitioner must keep separated, as it apparently refuses to do, the respective burdens of proof in this case. By erroneously attempting to show that the burden of proving seaworthiness is on the carrier, petitioner would have this Court rewrite the law in private carrier cases. The decisions are legion that the initial burden of proving unseaworthiness in private carrier cases is on cargo who has alleged it, and the burden of showing the use of due diligence, if reached, is upon the carrier.

Petitioner cites no relevant authority for its argument that before a carrier can show it used due diligence, it must first determine the nature of the unseaworthiness. It is interesting to note that counsel for this very petitioner unsuccessfully raised this same argument before the Second Circuit in the case of *Peter Paul, Inc.*, supra. There the vessel was a common carrier with far heavier burdens upon it than those imposed upon respondent in the instant case.

At pages 905, the Second Circuit said:

> "As an alternative theory appellants (petitioner here, i.e., cargo) claim that the notch was a discover-

able defect, or at the very least the ship owner has not shown that it was not * * *

* * *

"In our opinion it is not necessary and virtually impossible to state with any degree of certainty what actually caused the fracture.

"On this phase of the case all the ship owner (carrier) need establish is that normal precautions were taken to see that a discoverable notch did not exist. Appellants rely on the fact that there is no affirmative proof that such a defect was not present when the ship left Yokohoma. However, if positive evidence was required to establish a negative proposition of fact (here absence of a discoverable defect), no carrier could ever discharge its statutory burden of proof * * *"

Undoubtedly, petitioner, whose primary interests lie with cargo, would have this Court change the law, and impose the burden of proving the cause of the loss in private carrier cases upon the carrier and further force the carrier to go so far as to determine the exact cause of the alleged unseaworthiness before showing its requisite use of due diligence, which in this case, because the barge was found to be a constructive loss, meant respondent's complete exoneration. This argument of petitioner's counsel, we repeat, was expressly rejected by the Second Circuit in *Peter Paul, Inc.*, supra.

Again under its "Reason D", petitioner assumes the very point at issue in this case, namely, the unseaworthiness of the barge. Clearly, under the decisions of this Court, petitioner may not make such an assumption. The burden

of proving unseaworthiness was on petitioner and it failed to meet it.

Petitioner makes the unwarranted statement in its "Reason D":

> "If the cause of the loss is unseaworthiness, but the nature of that unseaworthiness has not been determined the carrier cannot establish that due diligence was exercised * * *."

The Court of Appeals, in conformity with the decisions of this Court, expressly found that the burden of proving unseaworthiness was upon petitioner, cargo; and that petitioner had not met this initial burden. Petitioner's counsel having admitted before the Court of Appeals that petitioner's expert surveyor, who it failed to call as a witness after listing his name with the District Court as a witness to be called by it, would have testified that the barge sank because improperly loaded by petitioner, should have to look no further for the cause of the sinking. Quite definitely this should suffice to convince petitioner that the cause of the sinking was not unseaworthiness. As said by the Court of Appeals, 329 F. (2d) 387 at 392:

> "This omission may have been advisable trial strategy—as the least hurtful—but it does not erase the adverse implication. His absence is damaging indeed. It implies that he would have testified to an inspection fulfilling the exactions of due diligence. O. F. Shearer & Sons v. Cincinnati Marine Service, 270 F. (2d) 68, 73 (6 Cir., 1960)."

Petitioner further argues that the decision of the Fourth Circuit is in conflict with *Schnell* v. *The Vallescura*, supra, decided by this Court in 1934. As pointed out previously in this Opposition Brief, there is no conflict with this Court's decision in *Schnell* v. *The Vallescura*, as such was a common carrier case and was involved only with the proof of certain exceptions under the Harter Act being pressed by the ship owner. It was not concerned, as in the instant case, with the proof of due diligence.

If the carrier exercised due diligence to furnish a seaworthy vessel, as so held by the Court of Appeals, then regardless of who had the burden of proving unseaworthiness, the carrier has fulfilled its obligation under the private contract of carriage here involved, all questions in issue are settled, and respondent is entitled to complete exoneration.

Needless to say that in this case all argument raised by petitioner, assuming arguendo their validity, pertaining to the burden of proving the cause of the loss, are moot, as respondent has been held to have established its use of due diligence by the Court of Appeals. Under the terms of this private charter party, respondent was responsible only for the use of due diligence, and the Court of Appeals has found that it adequately established its use of the same.

IV. *The Points Raised By Petitioner Are Not Of General Importance.*

For years the Courts have rendered decisions involving individual disputes pertaining to private contracts of carriage. The instant case presents nothing new or novel in this field. The questions raised in the petition have already been passed upon by this Court. The case here thus does not present any question that is novel or unique or of such

general importance as to warrant this Court in granting a writ of certiorari. Indeed it is a dispute solely between the two interests here involved and of major importance to no others.

A unanimous Court of Appeals has here decided:

(1) That cargo has not met its burden of proving unseaworthiness in this private carrier case where the trial Court applied the incorrect law, and

(2) That respondent, supported by petitioner's admission that its chief surveyor Jaeger would have testified the barge sank because of petitioner's fault loading, had obviously met its burden of showing due diligence.

Both of the above issues were resolved by the Court of Appeals in favor of the respondent, either of which standing alone, was enough to exonerate the respondent in this case.

As previously pointed out, there is obviously no conflict with any decision of this Court by the Court of Appeals on any of the questions raised in the petition.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied

Respectfully submitted.

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